This rule may, in some instances, work great hardship upon the claimant. In the first place, if he loses his first suit, he is barred from further remedy, if he wins, he gets a judgment which is merely prima facie evidence of the validity of his claim.[17] Furthermore, it is a notorious fact that the administration of many estates is prolonged for a long period of years, so that the claimant's witnesses may die or disappear in the meantime. The inequality in the position of the claimant and of the heirs, legatees and devisees, whereby those interested in the estate have at least two chances to win as against the claimant's one, suggests that section 1636 of the Code of Civil Procedure, as interpreted in the principal case, may be obnoxious to the equal protection clause in the state and federal constitutions. That inequality is at least as great as that existing between the mechanics' lien claimant and the owner in respect to the allowance of attorneys' fees, which induced the Supreme Court to declare a statutory provision, for such allowances to the lien claimant, unconstitutional.[18]

Although the point has never been directly raised, it is doubtful whether the heirs or other persons interested would be proper parties defendant in the suit by the claimant. By our system of administration the heirs are only brought into the proceeding at a certain stage upon petition and notice, and previous acts of the executor or administrator and the judge must occur before they can contest.[19] It is clear that they are not necessary parties,[20] and it is questionable whether the courts would allow the regular order of administration to be disturbed in such a case. It would certainly be impracticable to join the creditors in such a suit.

A. A.

MINING LAW: EMINENT DOMAIN: PUBLIC USE.—Few questions have been submitted to the courts upon which there have been a greater variety and conflict of reasoning and results than those presented as to the meaning of the words "public use", as found in the different state constitutions regulating the right of eminent domain.[1] The case of *Inspiration Consolidated Copper Company v. New Keystone Copper Company*,[2] follows the narrower interpretation and holds that, in order to constitute a

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[17] Shiels v. Nathan (1910), 12 Cal. App. 604, 108 Pac. 34; Estate of More (1898), 121 Cal. 635, 638, 54 Pac. 148.

[18] Builders' Supply Depot v. O'Connor (1907), 150 Cal. 265, 88 Pac. 982.

[19] Beckett v. Selover (1857), 7 Cal. 215, 241, 68 Am. Dec. 237. See Miller and Lux v. Katz (1909), 10 Cal. App. 576, at p. 579, 102 Pac. 946.

[20] Robertson v. Burrell (1895), 110 Cal. 568, at p. 575, 42 Pac. 1086.

[1] For a discussion of "public use" see comment on State ex rel. Mountain Timber Co. v. Superior Court (1914), 77 Wash. 585, 137 Pac. 994, in 2 Cal Law Rev. 318. Also see comment on Anderson v. Smith-Powers Logging Co. (Ore., 1914), 139 Pac. 736, in 2 Cal. Law Rev. 407.

[2] (Ariz., Nov. 25, 1914), 144 Pac. 277.

"public use", the use must be one in which the public itself participates. The condemnation of a right of way for a tunnel through the defendant's intervening mining property so as to connect plaintiff's non-contiguous groups of mining properties and facilitate the transportation of plaintiff's ore was denied on the ground that it was purely a "private use"; "as the tunnel could not be used by others only with the plaintiff's consent".

The court held that article two, section seventeen of the Constitution of Arizona which provides: "Private property shall not be taken for private use except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic or sanitary purposes, etc.", did not relate to "public uses" but only to the taking of property for a private use. And since the legislature had not defined "private ways of necessity" the court would not, in the absence of specific legislative definition, hold this tunnel to be a private way of necessity. It would seem, however, that this clause of the constitution was self executing and that it was consequently within the province of the court to interpret the meaning of this phrase and not to await further action of the legislature. It is admitted that the authorities are in conflict on this point. The courts of Washington have held[3] that a constitutional provision designed to protect the public against the taking of private property by the right of eminent domain, without just compensation, was not self executing and property could not be taken without statutory authority. On the other hand, the courts of Alabama[4] and Missouri[5] have held that such provisions enacted in the constitution are self executing and are to be enforced without supplemental legislation. The latter view seems to be the better and represents the modern tendency in the field of constitutional interpretation.[6] As was said by Mr. Justice Temple in the case of Winchester v. Howard,[7] which has been cited with approval:[8] "Under former constitutions it was natural that the court should presume that a constitutional provision was addressed to some officer or department of the government, or that it limited the power of the legislature, or empowered and perhaps directed certain legislation to carry into effect a constitutional policy. Now, the presumption is the reverse. Recently adopted state constitutions contain extensive codes of law, intended to operate directly upon the people as

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[3] Long v. Billings (1893), 7 Wash. 267, 34 Pac. 936; City of Tacoma v. State (1892), 4 Wash. 64, 29 Pac. 847.

[4] Woodward Iron Co. v. Cabaniss (1889), 87 Ala. 328, 6 So. 300.

[5] Hickman v. Kansas City (1894), 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658, 41 Am. St. Rep. 684.

[6] See Prof. O. K. McMurray's article "Tendencies in Constitution Making", 2 Cal. Law Rev. 203.

[7] (1902), 136 Cal. 438, 439, 69 Pac. 77.

[8] Denninger v. Recorder's Court (1904), 145 Cal. 629, 635, 79 Pac. 360.

statutes do. To say that these are not self executing may be to refuse to execute the sovereign will of the people . . . . I should say the rule now is that such constitutional provisions must be held to be self executing when they can be given reasonable effect without the aid of legislation, unless it clearly appears that such was not intended."

Furthermore, it would seem that it is made a judicial question by the last sentence of the section in point (article two, section seventeen), which provides: "Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public."

W. J. A.

MINING LAW: EXTRALATERAL RIGHT: APEX.—The United States Circuit Court of Appeals recently confirmed the decisions of the Idaho Supreme Court and the federal District Court, in the cases of *Stewart Mining Company v. Bourne* and *Stewart Mining Company v. Sierra Nevada Mining Company*,[1] previously noted in this Review.[2] The apex of the vein in question crossed the south side line of the Senator Stewart Fraction claim practically at right angles, and continued across this claim to within a short distance of the north side line where the vein was cut off abruptly by a fault. This fault so undercut the vein that if the country rock to the north of the fault were eroded away, it would have left the end edge of the vein, where it intersected the fault, standing out like an overhanging cliff. This end edge of the vein abutting against the fault and which on its dip crossed an end line of the claim, was claimed by the owner of the Senator Stewart Fraction to be part of the apex. The court, however, held that this end edge of the vein along the fault was not an apex in the true sense of the word and gave rise to no extralateral rights.

In the course of its opinion the court said: "Nothing to the contrary appearing, the conclusive presumption is that the Senator Stewart Fraction claim was located not exceeding 1,500 feet along the course or strike of the discovery vein and not exceeding 600 feet in width." This statement is somewhat misleading, for a presumption which may be rebutted can hardly be properly called conclusive. The conclusive presumption is that there was a discovery vein in the claim,[3] that the land was properly located,

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[1] (Nov. 2, 1914), 218 Fed. 327.

[2] Stewart Mining Co. v. Bourne (1914), commented on in 2 Calif. Law Review, pp. 247-48, not officially reported. Also see: Stewart Mining Co. v. Ontario Mining Co. (1913), 23 Idaho 280, 132 Pac. 787, commented on in 1 Calif. Law Review, pp. 546-48, and illustrated by a diagram for a case with identical facts.

[3] Iron Silver Mining Co. v. Campbell (1892), 17 Colo. 267, 29 Pac. 513.